Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-137 (3)

In The

Supreme Court of the United States

October Term, 1990

TRANS PACIFIC BANCORP,
TRANS PACIFIC NATIONAL BANK, et al.,

Petitioners,

v.

RICHARD F. SCHEY,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE DECISION BELOW HAS BEEN IDENTIFIED AND RELIED UPON AS PRECEDENT IN A RECENT PUBLISHED DECISION OF THE CALIFORNIA COURT OF APPEAL, AND HENCE IS PRECEDENT 2

II. ALTHOUGH CONGRESS' 1989 FEDERAL WHISTLE-BLOWER LEGISLATION DOES NOT APPLY TO SCHEY'S TERMINATION, IT IS CONSISTENT WITH THE OPINIONS OF THE FEDERAL CIRCUIT COURTS AND STATE COURTS OF LAST RESORT WHICH HOLD THAT THE TERMINATION OF NATIONAL BANK OFFICERS IS A MATTER GOVERNED EXCLUSIVELY BY FEDERAL BANKING LAW 3

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Berry v. Amer. Fed. Savings, 730 P.2d 905 (Colo.App. 1986) 4

Betz v. National Bank of Southern California (1988) 203 Cal. App. 3d 402, ordered depublished by the California Supreme Court on November 17, 1988. 6

Blote v. First Federal Sav. and Loan Assoc. of Rapid City, 422 N.W.2d 834 (S.D. 1988) 4

Inglis v. Feinerman, 701 F.2d 97 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) 5

Mackey v. Pioneer Nat. Bank, 867 F.2d 520 (9th Cir. 1989) 4, 5

Morast v. Lance, 631 F.Supp. 474 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987) 4

People v. Elinson, 70 Cal.App.3d Supp. 19, 26 n.2, 138 Cal.Rptr. 881 (1977). 2

Schillinger v. Wells Fargo Bank, 219 Cal.App.3d 570, 268 Cal.Rptr. 368 (1990). 2

Wiskotoni v. Michigan Nat. Bank-West, 716 F.2d 378 (6th Cir. 1983) 4

Statutes and Regulations

12 U.S.C. § 24, Paragraph Fifth 4, 6

12 U.S.C. § 1831j(c) 5

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Petitioners (collectively "the Bank") respectfully reply to the new matters referred to in Respondent Schey's Brief in Opposition to the Petition.

I. THE DECISION BELOW HAS BEEN IDENTIFIED AND RELIED UPON AS PRECEDENT IN A RECENT PUBLISHED DECISION OF THE CALIFORNIA COURT OF APPEAL, AND HENCE IS PRECEDENT.

Schey argues in his Opposition Brief that the Decision below has been ordered depublished by the California Supreme Court (as noted by Petitioners), and therefore, under California's Rules of Court, has no precedential value in California. This is erroneous.

The California Rules of Court provide that an unpublished decision of the Court of Appeal may not be *cited* to another Court. However, and as the California courts have expressly held, an unpublished decision of the Court of Appeal, though not *citable* (by a party, for example) under the California Rules of Court, may be *precedential* to other California courts that locate and consider the unpublished decision. *See, e.g., People v. Elinson,* 70 Cal.App.3d Supp. 19, 26 n.2, 138 Cal.Rptr. 881 (1977) (noting the same and approving the reasoning of an unpublished decision of the California Court of Appeal).

Here, the Decision below has been identified, discussed and *referred to by name* in the Court of Appeal's *published* decision in *Schillinger v. Wells Fargo Bank,* 219 Cal.App.3d 570, 268 Cal.Rptr. 368 (1990). What could be better proof of the precedential affect of the Decision below than the fact that it is being publicly referred to and approved by the California Court of Appeal? Certainly, the California Court of Appeal considers the Decision below precedential, and by identifying it is

encouraging other courts and other parties to consider it as an accurate statement of California law.[1]

II. ALTHOUGH CONGRESS' 1989 FEDERAL WHISTLE-BLOWER LEGISLATION DOES NOT APPLY TO SCHEY'S TERMINATION, IT IS CONSISTENT WITH THE OPINIONS OF THE FEDERAL CIRCUIT COURTS AND STATE COURTS OF LAST RESORT WHICH HOLD THAT THE TERMINATION OF NATIONAL BANK OFFICERS IS A MATTER GOVERNED EXCLUSIVELY BY FEDERAL BANKING LAW.

Schey attempts to diminish the significance of the Decision below by referring to a 1989 amendment to the Federal Deposit Insurance Corporation Act (*not* the National Bank Act, as Schey states), which creates a limited, *federal* cause of action for employees of certain federally insured depository institutions who are discharged in retaliation of their reporting banking improprieties to the federal government. Schey suggests that the new

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[1] Conspicuously, Schey has not argued that the Decision below is correct or consistent with precedent, obviously because the Decision is in direct conflict with virtually all federal and state court decisions addressing the issue. As discussed, Schey has erroneously attempted to minimize the affect of the Decision by relying on its depublication. Generally, the pernicious practice of the California Supreme Court in depublishing flatly erroneous appellate decisions only serves to limit the victim of the decision to the immediate party affected. The published decision in *Schillinger* has assured the vitality of the Decision below, and proves that other national banks will almost certainly suffer from, and most likely be forced to confront, the ruling in the Decision below.

federal "whistle-blower" legislation proves that the Decision below is not in conflict with the numerous Circuit opinions holding that the National Bank Act preempts all state-created wrongful discharge claims.

This argument is a complete non-sequitur.

Schey does not, indeed could not, contend that the 1989 legislation applies to Schey, who was terminated in 1987, or other national bank officers who were terminated prior to August 1989 (when the new legislation was enacted). The federal legislation purports to create a new claim under federal law, and does not even purport to address the availability of state law claims for terminated national bank officers, which was the issue addressed by the Decision below.

The new legislation does not, and cannot, reconcile the Decision below with federal decisions (or the decisions from other states, with the exception of the New Hampshire Supreme Court) existing prior to August 1989 which held that a national bank officer in Schey's position could assert no federal or state claim for wrongful discharge. *See, e.g., Mackey v. Pioneer Nat. Bank*, 867 F.2d 520 (9th Cir. 1989); *Morast v. Lance*, 631 F.Supp. 474, 484 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987); *Wiskotoni v. Michigan Nat. Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Blote v. First Federal Sav. and Loan Assoc. of Rapid City*, 422 N.W.2d 834, 838 (S.D. 1988); *Berry v. Amer. Fed. Savings*, 730 P.2d 905 (Colo.App. 1986). These decisions continue to state the correct interpretation of Section 24, Paragraph Fifth of the National Bank Act which applies to the many bank officers who, like Schey, were terminated prior to

August 1989, and who have filed or will file claims against their former employer.

Indeed, if any inference can be drawn from the enactment of the new federal whistle-blower legislation, it is that Congress itself recognizes that the rights of national bank officers against national banks are determined by Congressional legislation (such as the National Bank Act), and that without such legislation, national bank officers have no rights under federal or state law to assert against national banks. This is precisely the rule articulated in *Mackey v. Pioneer Nat. Bank*, 867 F.2d 520 (9th Cir. 1989) and in *Inglis v. Feinerman*, 701 F.2d 97 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), which was disregarded in the Decision below and will continue to be disregarded by the California courts.[2]

Most unfortunately, the threat presented by the Decision below is more likely to be enhanced, not reduced, by the federal whistle-blower legislation. Prior to the legislation, the California courts were repeatedly willing to create state rights against national banks, despite

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[2] The claim created by the federal whistle-blower legislation is far more limited than the claim asserted by Schey. The federal claim can only be brought in federal court, and offers only limited compensatory remedies. *See* 12 U.S.C. § 1831j(c)(allowing recovery only for reinstatement and limited compensatory damages; no emotional distress or punitive damages authorized). In sharp contrast, under Schey's state-created retaliatory discharge claim, Schey may attempt to seek punitive damages against the Bank. The Decision below renders the federal legislation meaningless, by authorizing former bank officers in California to sue in state court on state-created theories, thereby avoiding entirely the limitations of the federal whistle-blower claim.

unequivocal federal legislation to the contrary: in interpreting Section 24, Paragraph Fifth of the National Bank Act (which purports to entirely immunize national banks from liability for the wrongful discharge claims of former officers), the California courts have on at least two prior occasions (in the Decision below and in *Betz v. National Bank of Southern California* (1988) 203 Cal. App. 3d 402, ordered depublished by the California Supreme Court on November 17, 1988) ignored uniform federal decisions holding that the rights of a former bank officer against a national bank are determined solely by federal law.

How much more willing will the California courts be to expand the liability of national banks under state law when they have the pretext of simply following the policy of a federal statute that creates a limited federal right against a national bank? Contrary to Schey's argument, national banks in California now face much more than the innumerable claims of officers who were terminated prior to the enactment of the federal whistle-blower legislation. In all likelihood, the California courts will use the federal whistle-blower legislation as license to adopt wholesale expansive theories of liabilities against national banks. This threat can only be curtailed by this Court granting this Petition.

CONCLUSION

Granting this Petition will secure uniformity of decision concerning the meaning of the National Bank Act, and its application to national banks throughout the United States. For the aforementioned reasons, the Bank respectfully prays that this Court grant this Petition.

Respectfully submitted,

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